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Supreme Court of the United States

October Term, 1940

No. 1054

HOWELL VAN AUKEN, Administrator with Will Annexed of the Estate of Lila Eddy Doubleday, Deceased, and CYNTHIA MILLS CLEVELAND,
Petitioners and Appellants Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY of Saginaw, Michigan, as Trustee, etc.,
Respondent and Appellee Below,
C. K. EDDY AND SONS, a Corporation, CHARLOTTE D. MORGAN, E. PERRY SHORTS, GEORGE B. MORLEY and his Executors, and MERCANTILE TRUST COMPANY of Baltimore, Maryland,
Respondents and Appellees Below

MOTION FOR LEAVE TO FILE ADDITIONAL REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1940

No. 1054

HOWELL VAN AUKEN, Administrator with Will Annexed of the Estate of Lila Eddy Doebler, Deceased, and CYNTHIA MILLS CLEVELAND,
Petitioners and Appellants Below,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY of Saginaw, Michigan, as Trustee, etc.,
Respondent and Appellee Below,
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MOTION FOR LEAVE TO FILE ADDITIONAL REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

Your Petitioners respectfully ask leave of this Honorable Court to file the additional reasons relied on for allowance of writ of certiorari, as follows:

X. "An Important question of judicial administration pertaining to the exercise of federal equity jurisdiction,"

See—

Sprague v. Ticonic National Bank, 307 U. S. 161

is raised on this record and the judgments of the two Lower Courts—in that—

(1) In *Sprague v. Ticonic Bank supra,* such questions of public importance were raised as:

(a) Could contribution of counsel fees be enforced after the term of court—

(b) Did the Supreme Court's mandate foreclose the Lower Courts from deciding on the merits—whether counsel fees should be allowed—where the petitioner's suit did not

"automatically establish a fund in which others could participate."

See—Page 166 of 307 U. S.

(2) *And in the case at bar*—Petitioner Cleveland's application for Writ of Certiorari also *raises questions of great public importance*—and pertaining generally to "the exercise of federal equity jurisdiction,"—

For Petitioner Cleveland defended (in her own behalf) a Trustee's suit for release from liability *for admitted losses to trust assets*—

where no one represented the Public interested in the Charitable Trust—which also suffered much greater losses in its trust assets—of the same character as petitioner Cleveland's losses.

Under such circumstances—it is respectfully submitted that questions of great public importance are presented, namely:

(a) Should any Trustee—which expressly admitted heavy losses of trust assets, in its own (Trustee's) suit—be entitled to recover counsel fees from any *cestui que* trust—

who, upon being made defendant, thereupon, demanded that the Trustee judicially justify the admitted losses—

(b) Should all *cestui que* trust be taxed counsel fees (in proportions equal to their interests in the admittedly lost trust assets) unless some particular *cestui que* trust appeared in the case—*and disclaimed all responsibility for—or interest in—compelling the Plaintiff Trustee to judicially justify the losses.*

XI. "An Important question of judicial administration pertaining to the exercise of federal equity jurisdiction," is raised on this record and the judgments of the two Lower Courts—in that—

(a) Plaintiff Trustee Bank admitted in its amended complaint filed in March, 1935, (Par. 9, R. 19) losing $150,000 of Appellant Cleveland's $619,000 legacy—one-sixth of the stock of C. K. Eddy and Sons, under paragraph 9 of the will. See Paragraph (e) of Petitioners' Summary Statement of Matters Involved. Page 6 of the Petition.

(b) The District Court on April 11, 1936, ordered a full accounting—not only to find out what Appellant Cleveland's loss (under paragraph Ninth of the will) to her one-sixth of the Company's shares was (R. 117, 118)

but also what the charitable trust's losses had been (under Paragraph Tenth of the will) to one-half of the Company's shares, since the testator died in 1925 (R. 117, 118).

(c) No disinterested person—whatever— represented this Charitable Trust in one-half of the C. K. Eddy and Sons' shares—in the Lower Courts (R. 304, 686) and

the Trustee Bank's own counsel blandly so admitted in open Court—saying that the Trustee Bank (which had lost the trust assets) was representing the Charitable Trust (R. 304).

(d) Therefore, Appellant Cleveland, owning one-sixth of the shares—

being but one-third of the rights and interests in the estate, that the Charitable Trust owned—

herself defended the Trustee Bank's suit—and demanded that the Plaintiff Trustee justify these admitted losses of $900,000 in the trust estate—of which—

(1) one-sixth or $150,000 belonged to her—

(See Paragraph Ninth of Will, R. 8.)

(2) One-half or $450,000 belonged to the Charitable Trust—

(See Paragraph Tenth of Will, R. 10.)

(e) The District Court held no losses in the Trusts had occurred in the years 1925 to 1938—(although the Trustee Bank specifically admitted a loss of $746,000 as of June 30, 1938, R. 337).

And the District Court then ordered Mrs. Cleveland's one-sixth interest in the estate (one-sixth of the shares of C. K. Eddy and Sons) to pay all the costs of and expenses of the whole accounting—except $1000.00 to be paid by the Charitable Trust.

(See R. 187, Paragraph 8 of Court's Judgment.)

(f) The Appellee Trustee Bank is now attempting to tax about $35,000 of attorneys' fees and costs of this accounting against Appellant Cleveland's one-sixth of the estate—

(because she demanded that the Trustee Bank justify its admitted losses of the trust estate)

and the District Court only required the Charitable Trust to pay $1000 thereof—notwithstanding its interests in the estate were and are three times as great as Appellant Cleveland's are.

Therefore, such an award of costs and expenses of a trustee's accounting over a period of thirteen years—

relating to two separate and distinct trusts under the Ninth and Tenth Paragraphs of the will—

should not be made against Appellant Cleveland *alone*—whose interests were only one-fourth in value of the two trusts—

and such an award is contrary to the principles and reasoning announced in—

Sprague v. Ticonic National Bank, 307 U. S. at pages 166, 167

XII. The District Court ordered this accounting on April 11, 1936 (R. 117) and as required by its order (see paragraph 1)

the Corporate existence of C. K. Eddy and Sons was to be disregarded—and the assets of the family Holding Company were to be treated as the assets of the two trusts under Paragraphs Ninth and Tenth of the Will.

Exhibits 3, 4 and 5 were prepared by the Trustee Bank to show what was the undistributed income during the years 1925 to 1938—see the testimony of the Trustee Bank's auditor, Mr. Walton, at page 248 of the Record.

(a) The Trustee Bank's auditor found a total in those thirteen years of $541,000 of undistributed income (R. 244).

(b) After the Exhibits 3, 4, 5, 9, 10 and 11 (Record Volume II) had been prepared—at the Court's order of April 11, 1936, by the Trustee Bank—and showed—

(1) $541,000 of undistributed income—(R. 311)

(2) $748,000 of losses in principal—(R. 337)

then the District Court—merely stating no fraud had appeared—

set aside his interlocutory order of April 11, 1936 (R. 117), and held that the mere par value of the corporate shares constituted the trust estates (R. 171, 173), and, therefore, the Trustee Bank had not lost any of the trust assets because the shares of stock of C. K. Eddy and Sons were in the trustee's hands.

Thus the District Court by its judgment compels appellant Cleveland to accept her legacy of one-sixth of the shares—with a loss of $124,000 in their value—as proved conclusively by the audits of the Trustee Bank's own auditors.

XIII. The District Court refused to give to Petitioner Van Auken, the administrator of Lila Eddy Doebler, the life tenant (under paragraph of the Will

R. 8) of one-third of the shares of C. K. Eddy and Sons—

her one-third of the undistributed and accumulated income of $541,000, in the thirteen years of 1925 to 1938.

The District Court merely found that Mrs. Doebler before she died in May, 1938, had received all she was entitled to—in the dividends actually declared by the Trustee Bank. See District Court's Judgment, Paragraph 11, R. 185.

And this decision of the District Court was made despite the Plaintiff Trustee Bank had admitted in open Court that the

Trustee Bank's own auditors—working under the Order of April 11, 1936, (R. 117, 118) entered by the Plaintiff Trustee Bank—

had actually found and admitted that $541,000 of income should have been paid out and distributed in the years of 1925 to 1938—of which one-third or $180,000 belonged to Mrs. Doebler.

See—R. 237, 238, 239, 244

Turning to the Record on pages 237, 238, 239—we find Trustee Bank advising the District Court that:

> "Mr. O'Keefe: This is the main report; the other two (Exhibits 4 and 5) are merely supplemental, carried on from year to year.
>
> Exhibit 3, page 1, says these statements have been prepared from the records and information furnished us for the purpose of showing the condition of C. K. Eddy and Sons as of April 22, 1925, the date of Arthur D. Eddy's death, and the effect subsequent transactions to June 30, 1936, have had upon corpus and income. * * *

So, based on the method that was used in making that appraisal I have this figure to compare with either this or this (indicating), and bearing in mind that there was $477,619.70 worth of income which we had found and believed should be distributed as income to those who were interested. * * *

In this section is a summary of the income, as we have termed it, available for distribution to the beneficiaries, and when we deduct these dividends that have been paid, it leaves the $477,-619.79, which I have spoken of.

The Court: In other words, that means that the Eddy Corporation did not pay out as much in cash dividends as they had actually earned.

The Witness: All on the basis of this classification between the corpus and income.

The Court: The income that had not been paid in dividends.

The Witness: That is right. That is classified as between corpus and income. * * *

The Witness: Exhibit "D" is the summary of the net income shown by the books, and the net income as we found it.

The Court: The amount they have paid is less than what you find they should pay?

The Witness: That is right.

Mr. O'Keefe (Interposing): To the life tenant. I don't know as they would have to pay that to Mrs. Morgan. That is an adjustment your Honor has to make respecting only paragraph 9 of this will.

The Court: It doesn't matter to them whom they paid it, unless they paid it to the wrong party.

Mr. O'Keefe: They haven't paid it to anybody. * * *" (R. 237, 238 and 239.)

And of this admitted $180,000 of unpaid income due Lila Eddy Doebler's Administrator, Mr. Van

Auken, Petitioner herein—$72,000 covered the period from Mr. Eddy's death in April, 1925 to December 31, 1936 (R. 279)

(a) During which period of twenty months no income or dividends was paid to Mrs. Doebler at all (R. 280)—

although she was entitled to it.

See—

Poole v. Trust Company, 191 Mich. 162 at 171

And although the District Court's order of April 11, 1936, provided explicitly she was to be paid the income from one-third of the shares—starting with the death of Mr. Eddy in April, 1925.

The order stated:

"And income of the trustees under the Ninth and Tenth Clauses of the will shall be payable from the date of the death of the testator."

See Paragraph 3 of Order (R. 117)

(b) But the District Court in its judgment and Findings filed February 7, 1939—

merely passed this all off with the comment that:

"I have already found that the trust set up was of shares of stock, and not the assets of the C. K. Eddy Corporation. Mrs. Doebler, or her trustee, Mercantile Trust Company, of Baltimore, Maryland, obtained all of her share of the dividends declared on the stock. She was entitled to nothing more. She was not entitled to the income on the assets of C. K. Eddy and Sons. * * *" (R. 182.)

XIV. The District Court's Judgment only required the Charitable Trust to pay $1000 of these $35,000 of costs, the Trustee Bank is now trying in the District Court to tax against Appellant Cleveland's one-sixth of the family Holding Company's shares—

and the District Court remarks—in justification of this—that

"There has been no complaint with regard to the Tenth Paragraph." (R. 173.)

Of course this was so—for no one was in Court to represent the Public of Michigan—the Beneficiary of the Charitable Trust—

and the District Court's attention (R. 304, 686) was repeatedly called to the fact that the Attorney General of Michigan was not a party to represent the beneficiaries of the Charitable Trust—as required by the Statutes of Michigan.

See—

Sections 13512, 13513 Compiled Laws of 1929 of Michigan

Yet—the District Court paid no heed to the derelict Trustee Bank taking a judgment *in its own favor*—of no negligence in losing several hundred thousand dollars of this Charitable Trust's assets.

The State of Michigan, by its proper officers, should have represented the Charitable Trust.

Girard v. Philadelphia, 7 Wall (74 U. S.) 1, 15

And Your Petitioners respectfully submit this Record and the Judgments of the Lower Courts raise and present—

"important questions of judicial administration pertaining to the exercise of federal equity jurisdiction"—

within

Sprague v. Ticonic National Bank, 307 U. S. 161

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals, Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its Docket—

No. 8366

HOWELL VAN AUKEN, Administrator with Will Annexed of the Estate of Lila Eddy Doebler, Deceased, and CYNTHIA MILLS CLEVELAND,
Appellants,
vs.
SECOND NATIONAL BANK AND TRUST COMPANY of Saginaw, Michigan, as Trustee, etc.
Appellee,
C. K. EDDY AND SONS, a Corporation, CHARLOTTE D. MORGAN, R. PERRY SHORTS, GEORGE B. MORLEY and his Executors, and MERCANTILE TRUST COMPANY of Baltimore, Maryland,
Appellees.

to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the decree therein of said Circuit Court

of Appeals be reversed by this Court and for such other and further relief as this Court may deem proper.

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State of Michigan,
County of Wayne—ss.

Howell Van Auken being duly sworn, says that when the Petition for Writ of Certiorari (filed in this cause) was being prepared, counsel for petitioners were not then advised of this Honorable Court's recent decision of *Sprague v. Ticonic National Bank, supra,* (307 U. S. 160).

and that he believes the filing of these Supplemental Reasons for Allowance of the Writ of Certiorari is necessary to the proper protection of Petitioners' rights and interests in this cause.

Howell Van Auken.

Subscribed and sworn to before me this 20th day of May, 1941.

Marie Tritle,
Notary Public, Wayne County, Michigan.
My commission expires July 21, 1941.